No. 14680

In the United States Court of Appeals for the Ninth Circuit

National Labor Relations Board,

Petitioner

v.

Texas Independent Oil Company, Inc.,

Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT

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SIMS PRINTING CO.

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AUTHORITIES CITED

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BRIEF FOR RESPONDENT

Petitioner in the present proceedings asks enforcement of an order for back pay to four employees of Respondent, as follows:

Kenneth L. Van Horn	$1,259.62
John E. Cox	238.90
E. W. Ritchins, Jr.	840.46
Harry M. Almada	1,141.46

In addition to the order for back pay, the Board had directed the reinstatement, and a posting of a Notice that the Respondent had been ordered to cease and desist from unfair labor practices.

The order was fully complied with, except for payment of back pay. The men declined reinstatement. They had been re-employed, and two men, E. W.

Ritchins, Jr., and John E. Cox, had received more pay from their new employment than they would have received had they continued in the Respondent's employment, one by $398.33, and the other $481.13.(i)

The Company's Operations

It was a new operation for the Respondent, beginning the middle of April, 1953, with the employment of two truck drivers.

The Respondent undertook to deliver its gasoline from El Paso to Phoenix, a distance of 427 miles, with heavy laden gasoline trucks.

A division point was established in Lordsburg, N.M., midway between the points, where a driver from Phoenix delivered his truck to another driver who drove on to El Paso, and a returning driver delivered his gasoline-laden truck to one who drove on to Phoenix.

M. A. Quisenberry was employed to set up the operation, with headquarters, first in Tucson, and later at Lordsburg, where the acts complained about in this proceeding were performed. (R.238).

The Complaint was filed against the Company by a Local Tucson Labor Union who, it seems had attempted an organization of the workers some time after the operations began. It appears that Quisenberry requested the men not to organize until "he got rolling", as he expressed it.

This complaint (R.3) alleged there were eleven men employed at that time and that the Company was dis-

(i) Reference is made to the Petition for Rehearing.

couraging membership, and complained that four men had been discharged.

A hearing was ordered, and at the time of hearing, in October, there were twenty-six men then employed, and some fourteen others who had been employed and let go in the meantime, were on the day of hearing submitted as complaining. After hearing, the Examiner dismissed the complaint as not having any merit, except for three employees.

The Board, on review, has affirmed the action of the Examiner, and added the name of Almada, naming four employees as having been discharged.

The Board does not find that there was not cause for discharging, but challenges the "motive" of the Company.

> As a legal proposition, Section 10 of the Act provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

The defense of the respondent is predicated upon the proposition that the men to whom back pay has been awarded were discharged for cause. The cause for discharge was stated to the men at the time of their suspension, and the existence of the cause was not disputed by the men. It was not a fictitious or trumped up charge. The acts committed for which the men were discharged were not manufactured out of whole cloth. The cause for removal actually existed, and there is no finding by the Board, or the Examiner, that the cause did not exist, or was not sufficient in itself, in the exercise of good management, to justify dismissal.

The case of the General Counsel is premised upon the proposition that the "motive" of the Company was base and illegal, and as expressed by the Examiner, "Quisenberry's antipathy to the union".

Quisenberry's "antipathy," so-called, to the union is predicated upon conversations had with the men at the time of employment, and as described in the Examiner's report, (R.66-68), setting forth specific unfair labor practices charged to Quisenberry.

We respectfully invite the Court's attention to these several specific findings, and to demonstrate it was solely the conversations of Quisenberry, a supervisor employee of the Company, engaged in the first six weeks of operations.

No proof, evidence, or attempt was made to connect the Company policy, instructions or approval with these alleged unfair practices. Section 2 (13) does not deny the Company the right to deny, as it did, the authorization or approval, and shift a burden to the Government to then establish the fact with proof.

Quisenberry's "antipathy to the union", upon which the Company's motive and intent to commit illegal acts, and unfair labor practices in discharging four employees, is evidenced, says the Government, by specific instances and acts of Quisenberry, set forth in the Examiner's findings. (R.66-68).

The time these alleged acts took place becomes important because it evidences, and establishes that the Company itself, through its management, the President, immediately upon learning, and being advised

Quisenberry had committed the acts alleged, repudiated, and put a stop to the very acts claimed to be the acts of the company.

The unfair labor practices found by the Examiner, and approved by the Board as having occurred, that estopped the Company from thereafter discharging an employee for cause, consisted of, (a) interrogating Almada as to his union affiliation when he was employed April 11, (b) statement made by Quisenberry to Almada, May 30, why he had discharged Ritchins, (c) statement made by Quisenberry that Cox had lied to him about union affiliation, on May 24, (d) and on May 15 instructing Almada to have nothing to do with the union; by interrogating Cox, May 15, whether he was keeping up his union book; on April 12 interrogating Jenson and Cox as to their union affiliation, and interrogating Turner on April 13 as to his union affiliation; on May 25 he interrogated Bailey as to his union affiliation.

That these acts were not the Company policy, was testified to by the witness (R.292-293) at the instance of the Examiner, who developed that Quisenberry did this without authority and that, when the Company found out about his alleged acts, he was instantly told to stop, and he did. The provision of Sec. 2 (13) of the Act are not applicable, as urged by Government, because the Company ordered it stopped. The "agency" was not denied, but the acts were not authorized, and when the Company learned of the "interrogation" the Company acted, and before charges were made.

The Company's offices and headquarters are in Phoenex, Arizona, where the office of the President and management is maintained. Quisenberry began his

operations in Lordsburg, New Mexico, some two hundred miles distant, where the conversations alleged to constitute "unfair" labor practices occurred. Several men had been employed by Quisenberry the first few weeks of operations without the Company's knowledge of the questions propounded to prospective employees relative to their union affiliation.

This was a new operation in the transportation of gasoline for the Company. Common or Contract Carriers had up until this operation transported the Company's products from California to Arizona, and the new operation undertook to transport gasoline from Texas to Arizona, and with the Company's own facilities.

There were no previous anti-union activities chargeable to the Respondent. There was no policy or history of the Company established in regard to employing either union or non-union men, and the President, and active manager of the Company's affairs immediately vetoed, and directed a discontinuance of, the acts complained of herein and for which the Board directed the Company to cease and desist.

This discontinuance was effected immediately upon learning of the unfortunate statements made by Quisenberry to prospective employees. It was corrected before any complaint was filed, and before the hearing, and before the entry of any order by the Board.

Mr. Steele, the President of the Company, corrected the things complained about, forbidding the interrogating and discussing union matters, immediately upon hearing that Quisenberry had talked about such matters (See R.292-293).

There is not a scintilla of evidence that Quisenberry or the Company engaged in any of the practices complained of after knowledge was brought home to the Company, and after the President ordered and directed Quisenberry to stop. Assuming that Section 2 (13) is sufficient to convict a person of complicity without proof, of an illegal act, it does not prevent a denial, and evidence that it was not authorized or approved. If the rules of Court are to be followed, and complicity is denied, then the Government is required to offer proof of complicity. This was not done. No evidence that the Company directed or approved the agent's illegal acts was submitted.

The Board's Order

It is true the Board ordered notices to be posted that the Company would henceforth cease and desist from illegal practices, which notice was posted. We do not, however, acknowledge that this was a confession that illegal practices had ever been authorized or approved. The Examiner and Board well knew when the order was issued that the Company had repudiated, and was not so engaged, when the cease and desist order was promulgated.

It gave the impression to the public, wrongfully, that the Company was a law violator, as the unfair question of a witness, "when did you stop beating your wife?"

The order required the Company to reinstate all four without prejudice. Van Horn was then working for the Company and the testimony taken at the hearing established he had been re-employed. The other three declined re-employment, and had been otherwise re-employed by others. Two employees actually profited

by their change of employment, as we pointed out in the motion for re-hearing.

The discharge of the men themselves was not an unfair labor act. Union membership alone is not a guarantee of employment.

The Government contends it was the "motive" of the company to be unfair toward men that belonged to a union.

This "motive" was evidenced, it is charged, by acts of Quisenberry during the first few weeks of the Company's operation; that these unfair labor acts, therefore, denied the Company the right to discharge for cause.

In the case of *N. L. R. B.* v. *Hinde Dutch Paper Co.*, 171 Fed. (2) 240, in denying enforcement based on a foreman's interrogation of an employee as to how he intended to vote, with a threat the owner would close if the plant were organized, the Court stated:

> "When not made in the exercise of authority, but in personal conversations, they do not appear to be the sentiments of the employer or his acts, and to make them such the circumstances ought to show some encouragement or ratification of such repetition as to justify the inference of a policy which they express."

The Board's conclusion from its findings that there was an illegal "motive" is an assumption.

Webster's International Dictionary, 2nd Ed., describes an assumption as something taken for granted, without proof, for the purpose of argument.

The facts in the instant case are not in dispute, the men were discharged for cause. It has been found that

because an employee had an "antipathy" to union men, ergo the Company's motive was illegal, and it is an unfair labor practice for a Company that harbors such an employee to discharge, with or without cause.

Judge Hutcheson, of the Fifth Circuit, in the case of *N. L. R. B.* v. *Fulton Bag and Cotton Mills,* 175 Fed. (2) 675, had a similar situation, involving "motive", and in denying an order of back pay, observed:

> "Unlike many of these cases, however, where the evidence is in conflict, the record here presents little conflict as to the facts, and the report deals not with resolving conflicts in testimony but with assigning motives and reasons for actions taken on facts as to which there is no substantial conflict"

HARRY ALMADA

Under the heading "The discharge of Almada", the Trial Examiner, (R.82-83) in his Report and Recommendation, makes the following finding:

> "The second fact, of greater weight, which is not disputed, is that Almada violated the company rule as to bumping tires, burned up a tire on the road, and endangered $30,000.00 worth of the company's equipment.
>
> It is likewise undisputed that after Quisenberry saw how bady the tire was burned, and learned that it had been left on the desert, because it was too hot for the tire rack of the truck, that he phoned Almada and discharged him.
>
> On all the evidence in the case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testi-

mony on this point which I credit, outweighs the inference arising from Quisenberry's anti-union conduct.

I find therefore that Almada was discharged for cause".

A review of the record itself will disclose that by driving on flat tires the heat generated results in fire that, unless detected, destroys vehicles carrying volatile, or explosive gasoline. It was further established that the practice of testing the tire pressure by bumping, as it is called, at regular intervals measured by distance traveled, avoids this hazard. We will point out there was such a rule, an understanding with Almada, specifically fixing not only the distance but the place for bumping; that Almada so acknowledges, and admits he violated, that rule and understanding; that a fire resulted, destroying the tire, endangering the equipment, following his violation of the rule, resulting in his discharge.

Almada testified (R. 147)

Q. "Just answer my question. Did Mr. Quisenberry ever instruct you to bump tires?

A. "He said to bump the tires every 60 miles.

(R. 155) He further testified:

Q. "Did you ever get any printed instructions from Mr. Quisenberry on the length of time which tires should be bumped?

A. "No, not exactly. We talked about that but I, myself, suggested that we check our tires at Deming and Las Cruces, and he said that would be all right."

Querry: Was there a breach, or violation of this rule or agreement?

Answer: See testimony (R. 147-148) Almada testifying:

Q. "How far out of Deming, New Mexico, were you at the time you stopped and bumped them?

A. "I would say 15, 16, 17 miles this side of Las Cruces *when the tire went down.*"

Beginning his trip to Lordsburg, driving east toward El Paso, Almada passed Deming, 60 miles east of Lordsburg, the place agreed upon as the distance and place for bumping, without observing the rule and the understanding. Almada continued on and did not bump at 80 miles, which the General Counsel insists was the rule. The testimony shows he continued on until fire resulted, a distance of approximately 16 miles east of Las Cruces or 102 miles distant from the starting point.

We submit the premises upon which the Board predicated its judgment, that no rule of the Company was violated, giving grounds for dismissal, is repudiated by Almada himself.

Although the Board found the rule had not been violated, and that there was no rule, the reasoning following this finding is rather inconsistent for the Board immediately finds that such a rule would be unnecessary anyway because the risk is one the Company should bear as a "business hazard".

By suggesting that the Company should not discharge an employee for violating a rule because it was a "business hazard" to destroy Company equipment on

the highway overlooks entirely that the burning of a gasoline truck not only destroys the Company property, but imperils and endangers the driver himself, and the public safety, and destruction of property upon and adjacent to the highway itself.

Quisenberry does not ride with drivers. He is not able to check whether there is a violation of a rule until trouble results. Naturally, the doubt arises in the Supervisor's mind, how many times has Almada violated the rule. Accidents do not occur every time he fails to bump the tire at 60 miles. If he is driving every day from Lordsburg through Deming to Las Cruces without bumping tires, there is no way of knowing until the tire burns. The driver was caught this time. There is no way of knowing the number of other times that this and other drivers flaunted the rule of the Company. There is no way the Company has to enforce its rules, involving safety to property and persons, that impresses the drivers as much as discharge. The drivers knew Almada was so discharged.

The Labor-Management Act does not empower the Board to substitute its judgment as to whether loss suffered by acts of an employee for violating a rule should be borne by the Company as a "business hazard". In ruling that the Company should bear the loss as a business hazard, rather than discharge an employee for destroying its equipment in violation of its rules, the Board has entered the field of management.

In order to discredit Almada's testimony that his instructions were to bump the tires at 60 miles, and at Deming in accordance with his own suggestion, the Board's counsel offered in evidence a blank form of rules, on which someone had inserted with a penciled

notation the figure "80" as the distance at which the tires should be bumped.

Almada, himself, denied that any such rule had ever been shown or given him. (See testimony supra).

At pages (R.273-274), the Board's counsel offered in testimony Exhibit No. 3. It will be observed from an examination that there has been inserted the figure "80" as the distance which tires were to be bumped. This was identified by Mr. Quisenberry as a form used by the Company but denied that there had ever been any issued with the figure 80 inserted. There was no further identification, no evidence it had ever been issued, or seen by any driver, or relied upon. The counsel did not say where he obtained such an exhibit, who furnished it to him, and where the figure "80" came from. A reading of the testimony in connection with the counsel's offer will disclose that it was repudiated and, notwithstanding it was not verified, counsel placed it in the record, and this false statement has been seized upon, and stated in the opinion of the Board, as evidence that Almada was not to bump the tires except every 80 miles. The exhibit was identified because Quisenberry's signature was written thereon, and Quisenberry admitted his signature, but denied placing "80", or having authorized its insertion.

The opinion, therefore, prepared for the Board's signature containing the statement, or finding of fact, that:

> "Almada's conduct conformed to a set of rules issued over Quisenberry's signature, stating in part, 'Drivers will bump tires at least every "80" miles'"

is not supported by any evidence in the record. Quisenberry identified his signature on a set of rules, but denied that he inserted or caused to be inserted the figure "80".

Furthermore, it is not true that Almada bumped the tires at 80 miles. Almada testified he was within 16 miles of Las Cruces when the tire caught fire. This is 102 miles from Lordsburg, and had not been bumped at 80 miles as the opinion states.

There is no evidence that the Company ever issued rules that the tires be bumped every "80" miles. The sworn testimony is that 80 miles was not a Company rule. Almada himself acknowledges the rule to be 60 and the place Deming, N.M.

The opinion is inconsistent in first saying there was no rule violated, and then suggesting an excuse for violating the rule by stating Almada was attempting to make up for lost time. If there had been no violation, why was it necessary to ignore the rule by making up for lost time. Fast driving to make up for a late start makes bumping more necessary and important at the regulated distances. Rules are made for employees without judgment or discretion. A driver, exercising good judgment, would know, without rules, that fast driving to make up for lost time requires bumping at regular intervals, not exceeding 50 or 60 miles, on heavy gasoline trucks.

Section 10 (b) of the Act, relating to competent evidence, limits the introduction to the rules prevailing in the District Court. Notwithstanding the denial by Quisenberry that the figure 80 was in any rules promulgated, the Board has found, contrary to the evi-

dence, that 80 was the Company rule. There is no evidence, no testimony of any witness that 80 miles was ever promulgated, and we defy Government counsel to point to any testimony in this record of such a supporting statement.

As a further argument, advanced in the Board's opinion, as to why the Examiner's report should be repudiated, and the integrity of the Company's motive in discharging Almada challenged, it is suggested that another employee, Wallsmith, had been guilty of burning tires twice previously, and had not been discharged for his acts. Therefore, to discharge Almada for burning a tire at his first act simply showed an ulterior motive on the part of the Company, especially because Wallsmith was not a member of the union.

The question might be asked, was Wallsmith's tire burned within the first 60 miles and before he negligently failed to bump the tire. Or was it burned by reason of failure to bump the tires. An examination of the testimony itself will be the best answer. We, therefore, quote it in full, as follows:

Mr. Langmade: I call Mr. Wallsmith. (R.309-310-311). x x x x

Direct Examination

TRIAL EXAMINER DOYLE: Have a chair and give your full name and address.

The WITNESS: George W. Wallsmith, Berino, New Mexico.

Q. (By Mr. Langmade) And by whom are you employed, Mr. Wallsmith?

A. Texas Independent Oil Company.

Q. When did you first go to work for them?

A. First engaged in labor around the 3rd or 4th of April.

Q. In other words, you were one of the original employees?

A. Yes, sir.

Q. Are you still employed there?

A. Yes, sir.

Q. What is your occupation with them, what do you do?

A. I am a truck driver.

Q. Have you carried out the instructions of Mr. Quisenberry in El Paso or been around him in the conversations with the men a considerable amount of the time?

A. A few times, yes, sir.

Q. Has he ever interrogated you as to your union affiliateship or whether or not you belonged to the union?

A. No, sir, he has not.

Q. When you were employed were you given any instructions as to speed?

A. Yes, sir.

Q. What were they and by whom were they given?

A. At that time the speed was 55 miles per hour.

Q. Who told you that?

A. Mr. Quisenberry.

Q. And what about the bumping of tires?

A. Well, he could have told me that, but it is understood that you bump them.

Q. What is your understanding?

A. Well, I have always tried to bump my tires every 50 or 60 miles.

Q. How long have you been engaged in truck driving?

A. Well, that is all I have practically done since 1933, I guess, when I first started.

Q. And what is the general practice about bumping tires?

A. I would say 50 to 60 miles.

Q. Did you ever burn up a tire in your experience?

A. Oh, yes, sir.

Q. And did you ever lose your employment on account of burning up a tire?

A. No, but I should have.

Q. I didn't quite hear your answer?

A. I didn't, but I should have.

Q. Why do you say you should have?

A. Well, there was not too much excuse to burn up the tire.

Q. And did you see this particular tire that was on Mr. Almada's truck?

A. No, sir.

Mr. Langmade: I believe that is all.

CROSS-EXAMINATION

By Mr. Schoolfield:

Q. How many tires have you burned up in your career as a truck driver?

A. Oh, a couple.

Q. At least a couple?

A. Yes, sir.

Q. Any more than that?

A. Not that I remember.

Q. And you were not discharged for that, is that correct?

A. That is right.

Mr. Schoolfield: I pass the witness.

TRIAL EXAMINER DOYLE: Mr. Wallsmith, are you a member of the union?

THE WITNESS: No, sir.

An impartial, and fair appraisal of the above testimony, by an unprejudiced person, it seems to us does not justify that Wallsmith had been guilty of burning two tires while employed by Texas Independent, and that Texas Independent failed to discharge him because he did not belong to a union. The Examiner did not find that Wallsmith had burned two tires while employed by the respondent.

During his whole career as truck driver, in over twenty years, he had burned two tires, not while he had been employed by Texas Independent.

Because the Board placed so much emphasis on this phase of the testimony, and referred to it so many times as the one thing that influenced the reversal of the Examiner, we submitted a Motion for Rehearing, Exhibit C, and an affidavit of Wallsmith, to which reference is made, stating that the Texas Independent knew nothing when it employed him about his having burned tires.

KENNETH VAN HORN

Van Horn had worked for the Company 10 days when he was let go for failure to report to work. (R.259-260-261). All employees were on a probationary period of 30 to 40 days, and all were so advised when employed. (R.251). Van Horn was back working for the Company before any complaint was filed as to his discharge. He was working for the Company when the trial, or hearing was had in Tucson. (R. 261).

The complaint of unfair labor practices was filed by the Union after Van Horn had been discharged. He was not included in the complaint as having been discharged without cause. The complaint named only four employees. At the trial Van Horn's name was moved by the Government Counsel as a complaining witness, and the Company had made no preparation to produce evidence or testimony as to his employment. All of the statements made by Van Horn about meeting some stranger in Chandler, that told what the President of the Company said, was all hearsay evidence, based on pure fiction, and came as a complete surprise to the

Company, wholly unprepared to meet. Therefore, the motion for re-hearing was filed which included the President's affidavit, to which we now refer. The Board refused to consider, and accepted evidence not admissable in a Court of law.

Van Horn's testimony, (R.190) it will be noted is what someone said to him, or what Quisenberry said to him about what someone else said. The man that told him was not under oath at the time he told him, and we submit is not competent evidence to establish a company statement or motive. It was a self-serving declaration, pure and simple, and is not evidence of either union activities on his part, or that it was coercion on the part of the Company restraining him from anything.

He admits the boss had to call him to get him to work. (R.201).

The statement on page 13 of Counsel's Brief, that Quisenberry admitted that Steele had ordered his dismissal, is not supported by evidence. Quisenberry did not so admit. It will be noted counsel does not refer to the Reporter's Transcript in support of such a statement. We respectfully refer to Quisenberry's testimony. A statement by Quisenberry that Van Horn got a "chicken deal" is not a statement that Steele ordered his dismissal.

It was Van Horn that said that Quisenberry made an admission not an admission made by Quisenberry testimony. One is a self-serving declaration, and should be distinguished from an admission.

Van Horn's discussion with some "old man" at Blakely's near Chandler was observed by Quisenberry

personally, (R.286) who was in the station at the time Van Horn was dumping the load of gasoline.

At the time of his discharge, Van Horn had earned and been paid for his 10 days labor the sum of $99.36. The back pay awarded him by the Board's Order amounts to $1,259.62.

E. W. RITCHINS, JR.

Ritchins was discharged for stripping the gears of heavy deisel equipment. It developed he had never driven heavy equipment, was inexperienced in handling multiple gears, resulting in heavy damage to the Company's trucks.

He was discharged during the probationary period of employment. He had been employed April 28 and was discharged May 25.

Ritchins admitted in his own testimony: (R.160)

Q. Now did you have any discussion about the union with Mr. Quisenberry from the day (employed) until the day you were discharged, that you can recall?

A. Not involving me, not that I can recall. (R.162-163)

Q. Did Mr. Quisenberry ever give you a reason for discharging you?

A. Yes, he told me — I had transmission failure about 45 miles east of Lordsburg, and it was due to that failure for them laying me off.

Quisenberry fully explains the reason for the discharge as incompetence. (R.254-255-256).

Ritchins' damage to the truck cost the Company $546.47.(i)

Ritchins actually received $398.33 more during the period he was discharged and for which back pay has been allowed.(i)

Add the amount of back pay awarded by this action, amounting to $840.46 to the $398.33, and it will be observed that Ritchins has a net profit of $1,238.79.

(i) See Motion for Rehearing

JOHN E. COX

John Cox was discharged May 15 for speeding. (R.256-259). Trucks are equipped with a chart showing the revolution per minute and the resulting speed.

Although the Examiner does not question the fact that Cox did violate the speed instructions, the ground upon which he found the Company liable for an unfair labor practice, (R.67), is because Quisenberry asked Cox if he was keeping up his union book.

There was a further finding by the Examiner that up until May 15 (R. 37) there was no organizational activity on the part of the union.

The conclusion was reached, therefore, because Quisenberry asked if he was keeping up his dues, it was an unfair labor practice and therefore he could not be discharged for speeding. This inquiry by Quisenberry constituted, in the opinion of the Examiner, "union and concerted activities" and that the speeding was not "the compelling reason."

There was a further finding by the Examiner that the testimony of Cox could not be relied upon. (R.72).

Cox had lost no pay after his discharge. He had, in fact, exceeded the amount of money he would have earned had be continued in the employment of the Respondent by $481.13.(i)

Add to this the amount awarded him by the Board of $238.90, Cox actually benefited financially in the amount of $720.03.

The Substantial Evidence Rule

We submit that the substantial evidence rule does not apply in the instant case.

The General Counsel submits his case upon the proposition that the record establishes that Quisenberry's acts the first few weeks of the Company's operations constitute unfair labor practice.

The Government devoted its entire record to establishing an unfair labor practice committed by Quisenberry.

There is respectable authority that these acts did not constitute unfair labor practice for the reason that Section 8 (c) of the Act provides that expressions of views, arguments, or opinions, written, printed or otherwise expressed, shall not be construed as unfair labor practice.(i)

Conceding, however, for the moment that there is substantial evidence to support a finding that Quisenberry's acts constituted unfair labor practice, there is no finding that there was not cause for discharge, or

(i) See Motion for Rehearing.

(i) We invite attention to decision under subject of "Authorities".

that the cause in itself was not sufficient to warrant a discharge.

Company's Defense

After the charges were filed, and before the hearing commenced, the Company's attorney propounded the legal proposition (R.120), that although there be a finding of wrongdoing on the part of an employee, that constituted an unfair labor practice, does it follow that an employee could not thereafter be discharged for cause.

The Examiner accepted this as the legal proposition, and the hearing was thereafter conducted upon this premise.

The Company, by its answer (R.112) filed in this Court, again put in issue the same legal proposition.

The Act itself provides that no back pay shall be awarded when an employee is suspended or discharged for cause, and back pay is the only question involved in this appeal.

There is no substantial evidence that the Company had any knowledge of Quisenberry's acts that constituted a violation of the Labor Act. There is no evidence of any history of anti-union practices. There is no evidence of any Company policy, or that Quisenberry's 'antipathy' was known to the Company.

On the other hand, there is evidence that the Company put an immediate stop to the practices complained of when brought to the attention of the Company. The acts took place some two hundred miles from the Com-

pany's offices, and during the first six weeks of the Company's operations.

It may be true the Court accepts the "findings" of the Board on appeal, but there is a distinction between a "finding" and a conclusion. If the Courts are bound by the conclusions as well as the findings, there would be no purpose in an appeal or review by the Courts.

The conclusion, in the instant case, by the Board is that an employee who committed an unfair labor act, and there being substantial evidence in support of that, any cause for discharge that may thereafter arise is unworthy of consideration, and no findings as to their existence or non-existence is necessary.

We submit there is no substantial evidence that cause did not exist for the discharge of the employees, and that under the Act "no order of the Board shall require back pay".

Respectfully submitted.

LANGMADE AND SULLIVAN,
By *Stephen W. Langmade,*
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Phoenix, Arizona.

June 15, 1955

APPENDIX

AUTHORITIES

In the case of *Sax, (d.b.a. Container Mfg. Co.) v. N. L. R. B.:* 171 Fed. (2) 769; Judge Minton (now Supreme Court Justice) speaking for the Circuit Court of Appeals, stated:

> "Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background, and not associated as a part of a pattern or course of conduct x x x cannot support a finding of a violation of Sec. 8 (1)."

Wayside Press Inc., v. *N. L. R. B.,* decided by Judge Denman, 9th Circuit, August 3, 1953, stated:

> "Use of employment application blank whether applicant is a union member is not a violation of 8 (a)
>
> (1) there being no showing of restraint or coercion."

In an opinion by the Board, reported in 24 L. R. R. M. 1377, in the case of *Chance Voight Aircraft* v. *N. L. R. B.,* it was stated:

> "Speeches made by employer's personnel supervisor to employees in which he stated the employer would prefer operating without a union for a year, and mentioned the benefits the employer had already given the employees, were privileged under Sec. (8) (c) as they did not contain a promise or threat of reprisal."
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> Isolated statements by Superintendent, not coupled with threats or coercion, that no union would exist where Superintendent worked, not evidence of coercion, citing:

114 F (2) 624 Martel Mills

116 F (2) 388 E. I. du Pont

119 F (2) 631 Quaker State Oil

120 F (2) 913 Wilson & Co.

Court denied petition for enforcement:

Held discharge of employee was not discriminatory, stating:

"It is the established rule that the employer may hire and fire at will so long as the action is not based upon opposition to union activities"; citing:

Jones and Laughlin Steel Co.	57 Sp Ct 615
Phelps Dodge	61 Sp Ct 845
Blue Bell-globe Mfg.	120 Fed. (2) 974
American Smelting	126 F (2) 680
Montgomery Ward	157 F (2) 486

N. L. R. B. v. *Enid Co-Operative Creamery,* 169 Fed. (2) 986.

Court denied petition for enforcement.

Board relied upon a course of conduct, and statements made by supervisory employees during a union's campaign to organize.

"The statements were made to various employees at their homes, on the street, or wherever they happened to meet. They were undoubtedly calculated to persuade the employees not to join the union. Thus they were told they would derive no benefit from joining

the union; that the wages were higher than the wages in similar plants, and that if the employees were unionized they might have to take a reduction in salary; that if they joined a union and failed to pay their dues they would be discharged, and other 'disadvantages' of union membership were pointed out.

But there is no evidence of any direct or subtile threats of coercion. No one was led to believe that membership in the union would affect his employment in any way, and there is no evidence whatsoever that membership in the union or membership activities prejudiced any employee."

"The Act prescribes interference, restraint and coercion—it does not prescribe "free trade of ideas" (authorities). The Board has a wide latitude in appraising facts and drawing inferences therefrom. It has the primary responsibility for the administration of the Act and, to that end, the right and duty to determine when facts constitute unfair labor practices. But we, along with the Board, have the duty to balance the employer's inalienable right of free speech and expression against the employees too freedom of self-organization."

See also:

Blue Flash Express, Inc., 109 N.L.R.B. No. 85, holding that interrogation, not tending to restrain, is not an unfair labor practice.